Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1863

DANNY C. LEWIS,
Defendant-Petitioner,

versus

STATE OF LOUISIANA,
Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

GRAVEL, ROY & BURNES
JAMES MICHAEL SMALL
Post Office Box 1792
711 Washington Street
Alexandria, Louisiana 71301

Attorneys for Petitioner

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822 1611

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STATE OF LOUISIANA,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

DANNY C. LEWIS, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Louisiana which affirmed the conviction of your petitioner of the offense of distribution of a controlled dangerous substance — Phencyclidine in violation of Louisiana R.S. 40:968A.

OPINIONS BELOW

TWELFTH JUDICIAL DISTRICT COURT
AVOYELLES PARISH, LOUISIANA

Attached to this petition is a copy of the Bill of Information charging petitioner with violation of La. R.S. 40:968A. (See Appendix A.) Also attached to and made

part of this petition is a copy of the trial transcript reflecting the jury verdict of guilty as charged (violation of La. R.S. 40:968A). (See Appendix B.) Petitioner was subsequently sentenced to serve six years in the custody of the Department of Corrections.

SUPREME COURT OF LOUISIANA

The opinion of the Louisiana Supreme Court bears the following style and caption: *State v. Lewis*, La., 328 So.2d 75. A copy of the opinion is attached to this petition and made part hereof. (See Appendix C.)

JURISDICTION

The decision of the Louisiana Supreme Court affirming mover's conviction was entered on February 23, 1976. Mover made a timely application for rehearing which was denied by the Louisiana Supreme Court on March 26, 1976. (See Appendix D.) Mover's Petition for Writ of Certiorari is due on or before June 24, 1976. (See U.S. Supreme Court Rules 22(1) and 34.)

THE QUESTION PRESENTED

1. Whether errors committed by the Trial Court operated both separately and cumulatively to deprive mover of a fundamentally fair and impartial hearing to which he was entitled under the due process clause of the Fourteenth Amendment to the United States Constitution. The specific errors mover complains of are set forth in his Assignments of Errors No. 2, 3, 4, 5, 9, and 11. (The Assignment of Errors filed in the

Louisiana Supreme Court is attached to and made part of this petition. See Appendix E.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Section 1, United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana R.S. 15:492:

> "When the purpose is to show that in the special case on trial the witness is biased, has an interest, or has been corrupted, it is competent to question him as to any particular facts showing or tending to show such bias, interest, or corruption, and unless he distinctly admits such facts, any other witness may be examined to establish the same."

Louisiana R.S. 15:495:

> "Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissi-

ble for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source than the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction and have failed distinctly to admit the same; and no witness, whether he be defendant or not can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

Louisiana Code of Criminal Procedure, Article 488:

"When there is a variance between the allegations of an indictment or bill of particulars which state the particulars of the offense, and the evidence offered in support thereof, the Court may order the indictment or bill of particulars amended in respect to the variance, and then admit the evidence."

Louisiana Code of Criminal Procedure, Article 489:

"If it is shown, on motion of the defendant, that the defendant has been prejudiced in his defense on the merits by the defect, imperfection, omission, uncertainty, or variance, with respect to which an amendment is made, the Court shall grant a continuance of a reasonable time. In determining whether the defendant has been prejudiced in his defense upon the merits, the Court shall consider all

the circumstances of the case and the entire course of the prosecution. If it becomes necessary to discharge the original jury from further consideration of the case, the trial before a new jury will not constitute double jeopardy."

Louisiana Code of Criminal Procedure, Article 770:

"Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial of an argument, refers directly or indirectly to: (1) race, religion, color, or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury; (2) another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible; (3) the failure of the defendant to testify in his own defense; or (4) the refusal of the judge to direct a verdict.

"An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the Court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial."

STATEMENT OF THE CASE

Defendant was charged by Bill of Information with the offense of distribution of a controlled dangerous substance — Phencyclidine, in violation of Louisiana R.S. 40:968A. After a jury trial, he was found guilty as charged and was subsequently sentenced to serve six years in the custody of the Department of Corrections. A timely appeal, assignment of errors, and designation of record was filed with the Louisiana Supreme Court and that Court affirmed mover's conviction on Monday, February 23, 1976, and denied his application for rehearing on March 26, 1976. Thus, this petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

It is the belief of this writer that the cumulative effect of the errors complained of in the State Court and now in this Court, under the particular facts of this case, operated to deprive the defendant of a fundamentally fair and impartial hearing to which he is entitled under the due process clause of the Fourteenth Amendment to the United States Constitution. Those errors are hereinbelow discussed.

I. SPECIFICATION OF ERRORS NOS. 2, 3, 4 and 5

Prior to trial, mover filed a Motion for Bill of Particulars requesting, inter alia, the identity of the person to whom the alleged transfer of a controlled dangerous substance was made. In response to that inquiry, the State informed the defendant, ". . . the Phencyclidine was distributed to a law enforcement officer,

namely TFC Herman Rogers, Louisiana State Police . . ." (See Answer No. 37 in State's response to defendants Motion for Bill of Particulars — Appendix F.)

During direct examination of Trooper Herman Rogers, the State sought to introduce evidence of a transfer of a controlled dangerous substance from the defendant to someone other than Rogers. (Pages 104 and following of Trial Testimony.) A timely objection was made by the defendant on the ground that the evidence was beyond the scope of the State's Answer in its Bill of Particulars. The objection was overruled by the Court. (Page 130 of Trial Testimony.) The defendant moved for a mistrial, (Page 131 of Trial Testimony) on the ground that the evidence allowed over his objection constituted an impermissible reference to another crime (one other than the crime set forth in the Bill of Information and particularized in the State's response to defendant's Motion for Bill of Particulars) allegedly committed by the defendant as to which evidence was not admissible. The Motion was denied. (Page 131 of Trial Testimony.)

Following the Court's overruling of defendant's objection to the admissibility of the proffered evidence, a written Motion for Continuance, alleging surprise and prejudice was filed and denied. (Pages 132 through 136 for argument on Motion. Motion denied — Page 136 of Trial Testimony.)

Prior to trial, the State served the defendant with notice of its intention to introduce evidence of other offenses, (alleged transfers of controlled dangerous substances to Trooper Herman Rogers) for the purpose of showing intent, system, and pattern. This

evidence offered pursuant to this notice, over defense objection, however, was of alleged transfers to someone other than Rogers, the person designated in the State's Notice of Intention. (Testimony and argument of counsel at Pages 136 through 183).

It is settled law in Louisiana that the purpose of a Bill of Particulars is to give an accused detailed information so that he will be fully apprised of the particular nature of the State's case and also to restrict the State in its proof to the facts and circumstances stated in the Bill. (See *State v. Ferguson*, 124 So.2d 558.)

Similarly, and more particularly, it is settled that when averments are made by the State in answer to a Motion for Bill of Particulars, it, in proving its case, is limited to them. (See *State v. Mann*, La., 202 So.2d 259 and authorities cited therein at 263. See also *State v. Bonfanti*, La., 227 So.2d 916.)

In the leading case of *State v. Bessar*, 34 So.2d 785, former Louisiana Supreme Chief Justice Fornet succinctly stated the rule as follows:

> ". . . And this bill, when furnished, operated to limit the scope of proof on the trial by restricting the introduction of evidence to the proof of those facts set out in the Bill of Particulars." *Bessar, supra*, at 789. See also authorities cited at 789.

In the instant case, the State informed the defendant in its Bill of Particulars (response No. 37) that the distribution of the controlled dangerous substance by the defendant was to one Herman Rogers.

In a hearing held out of the presence of the jury, Trooper Rogers testified that he never purchased any drugs from the defendant. (Page 164 of Trial Testimony). Trooper Rogers also testified that on the date of the alleged offense, he never spoke with the defendant and that all the drugs that he possessed were given to him by one Gary Francisco. (Page 261 of Trial Testimony.) Notwithstanding the officer's testimony, and the State's response in its Bill of Particulars, the Court permitted the State to elicit evidence of an alleged drug transfer from the defendant to one Francisco, who, in turn, allegedly transferred the drugs to Trooper Rogers.

This evidence was clearly beyond the scope of the State's Bill of Particulars and thus, should have been excluded from evidence. Failure to exclude the evidence was reversible error.

In allowing the State to introduce evidence which was beyond the scope of its Bill of Particulars, the Trial Court in effect allowed an amendment of the particulars. (See La. Code of Criminal Procedure, Article 488.) La. Code of Criminal Procedure, Article 489 provides, in essence, that the Court shall grant a continuance if it is shown that the defendant is prejudiced in his defense on the merits by the variance with respect to which an amendment is made. Defense counsel informed the Court through its written Motion for Continuance and in oral argument on that Motion that the amendment to the State's Bill of Particulars surprised and prejudiced the defendant. It is difficult to imagine a more damaging and prejudicial amendment than the one allowed herein. Denial of defendant's Motion for Continuance under the circumstances of this case constituted reversible error.

In its notice of intention to introduce evidence of other offenses to prove system and intent, the State informed the defendant it would introduce evidence of other drug distributions from the defendant to Herman Rogers. The evidence actually offered, however, was of drug transfers from the defendant to one Francisco. (Pages 141 through 182 and Pages 184 through 263 of Trial Testimony.) So, not only was the State allowed to go beyond its Bill of Particulars, it was also allowed to adduce evidence of other offenses not described in its notice. The prejudice resulting from these erroneous rulings is obvious and constitutes reversible error.

Louisiana Code of Criminal Procedure, Article 770 provides for a mandatory mistrial when a remark or comment of a District Attorney refers directly or indirectly to another crime committed or alleged to have been committed by the defendant, as to which evidence is not admissible.

Since the evidence elicited by the District Attorney from Trooper Rogers referred directly to a crime other than that charged in the Bill of Information, and particularized in the Bill of Particulars, a mistrial should have been granted.

II. SPECIFICATION OF ERROR NO. 9

In his pre-trial Motion for Bill of Particulars, the defendant inquired whether the State was aware of any inculpatory statements made by the defendant. (Paragraph 25 — Defendant's Motion for Bill of Particulars.) In response to this inquiry, the State answered, ". . . the defendant, Danny C. Lewis, did not make any oral communications or oral admissions or

oral statements, inculpatory or exculpatory to any members of the law enforcement agency in Avoyelles Parish, Louisiana, and at this time, the State of Louisiana is not informed as to any of the above statements made to any law enforcement officers made in Alexandria or Rapides Parish, Louisiana."

Nevertheless, on the morning of trial, the District Attorney served defense counsel with a "Notice of Intention to Introduce a Confession and/or Confessions and/or Exculpatory and/or Inculpatory Statement and/or Statements in Evidence".

This "Notice" did not, in any way, specify the type statement contemplated by the State. In fact, the District Attorney informed the Court at the time of the filing, that he was unaware of any statement made by the defendant and was merely furnishing the Notice in an abundance of caution. (Page 222 of Trial Testimony — Comments by the Court.)

Subsequently, the State sought to introduce an inculpatory statement allegedly made by the defendant to Trooper Rogers a week or so following the alleged drug transaction. The statement supposedly made by the defendant was, "How was the stuff" — an apparent reference to the drug. (Page 243 of Trial Testimony.) An objection was made by the defendant which was overruled by the Court. (Pages 240 through 241 of Trial Testimony.)

There are two serious problems with the "Notice" furnished by the State in this case. First, the Notice is precisely the sort that was condemned by the

Louisiana Supreme Court in the recent case of *State v. Sneed*, La., 316 So.2d 372. There, the Court stated:

> "Article 768 itself provides that the State must give notice of its intent to introduce a confession or inculpatory statement in evidence. The use of the singular, as well as the functional intent of the Article means that the State must give sufficient notice of each confession or inculpatory statement it intends to use with sufficient specificity as to date or occasion and as to persons to whom given as to afford adequate notice sufficient to permit the defendant a fair opportunity to meet the issue." *Sneed, supra* at 372.

Although finding the notice in *Sneed* inadequate, the Louisiana Supreme Court did not reverse since the defendant had been informed in an answer to his pretrial Motion for Oyer of the fact and of the content of the inculpatory statement. The Louisiana Supreme Court concluded, because of the above, that no prejudice resulted.

A similar conclusion is not warranted in this case. On the contrary, the State, in the instant case, not only failed to make known the fact and content of the inculpatory statement, but also denied its existence in its response to defendant's Motion for Bill of Particulars, and on at least two other occasions.

The State's denial of the existence of the inculpatory statement presents the second problem with respect to the State's Notice of Intention.

In the recent case of *State v. Boothe*, La., 310 So.2d 826, the Louisiana Supreme Court spoke to this very issue. In *Boothe*, the defendant sought to determine the existence of any inculpatory statements by way of a pre-trial Motion for Bill of Particulars. In response to the Bill of Particulars, the State informed the defendant that it had no confession, admission, or adverse statement of the defendant. Nevertheless, on the morning of trial, the State served defendant with a Notice of Intention to introduce into evidence that inculpatory statement. The defendant objected to the introduction of the statement, the objection was overruled and the statement was introduced into evidence. The Louisiana Supreme Court reversed the conviction in *Boothe* and in so doing stated:

> ". . . by its untruthful reply to defendant Boothe's inquiry in the present case, the State lulled defense counsel into the impression that the State had no statement . . ."

The Louisiana Supreme Court also stated:

> ". . . we refuse to hold that the State can succeed in deliberate or negligent misrepresentation and thereby force the defendant to seek additional time in which to adjust his trial tactics or suffer the attendant prejudice without any hope of relief. To so hold would encourage willful or negligent misrepresentation by the prosecution in its pretrial dealings with the defense and would encourage Court delays . . ."

The District Attorney in the instant case assured the Court that it was unaware of the inculpatory statement prior to the second day of trial. If this is, in fact, the case, it is nevertheless inexcusable. The decision in *Boothe* condemns negligent as well as deliberate misrepresentation by the State. The State's response to defendant's Motion for Bill of Particulars in the instant case, at the very least, was negligent and accordingly, is governed by the *Boothe* decision.

III. SPECIFICATION OF ERROR NO. 11

During the presentation of the defendant's case, Buvens Prevot was called as a defense witness to contradict certain testimony of Trooper Herman Rogers. During cross-examination of this witness, the District Attorney asked him whether his brother, Mark Prevot, (who was not a witness) had been busted on two occasions. (Pages 356 through 358 of Trial Testimony.) Defendant's objection to this question was overruled and the witness answered affirmatively. (Page 358 of Trial Testimony.)

La. R.S. 15:495 permits impeachment of a witness by evidence of conviction of crime but not of arrest, indictment, or prosecution.

The question put to witness Prevot was grossly inappropriate for two reasons. First, and more importantly, it was a highly prejudicial and inflammatory inquiry into prior arrests. Secondly, it inquired into prior arrests, not of the witness, but of the witness' brother.

In a rather lengthy discussion of this error, the Louisiana Supreme Court agreed with the defense contention that the question put to witness Prevot and its response, were inappropriate and should have been excluded from evidence; however, concluded that the error was harmless and accordingly, did not reverse the conviction.

The prejudice resulting from the admission into evidence of the response of witness Prevot is grossly prejudicial, particularly in the context in which it came. Defendant was being tried for distribution of a controlled dangerous substance and the reference made to witness Prevot obviously had an extremely prejudicial effect. It is difficult to imagine how the fact that the witness' brother had been arrested on two prior occasions would have any bearing on this witness' testimony. The question and response were highly prejudicial and inflammatory, particularly in view of the fact that defendant was being tried for distribution of a controlled dangerous substance. The District Attorney, no doubt, knew that the question was improper as did the Louisiana Supreme Court.

The cumulative affect of the errors complained of herein in view of the nature of the case was to deprive the defendant of the fundamentally fair and impartial trial to which he is entitled under the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court below is

erroneous. For the reasons assigned, the present petition for Writ of Certiorari should be granted.

Respectfully submitted,

GRAVEL, ROY & BURNES
JAMES MICHAEL SMALL
Post Office Box 1792
711 Washington Street
Alexandria, Louisiana 71301

_____

J. Michael Small

CERTIFICATE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served by first class United States mail, properly addressed and postage prepaid to each of the following:

Attorney General William Guste,
State Capitol, Baton Rouge, Louisiana; and

District Attorney Eddie Knoll,
Avoyelles Parish Courthouse
Marksville, Louisiana,

this ____ day of June, 1976.

Alexandria, Louisiana.

_____

Of Counsel

APPENDIX A

STATE OF LOUISIANA
Parish of Avoyelles

November Term 1974

IN THE TWELFTH JUDICIAL DISTRICT COURT

Now upon this the 22 day of November 1974 into the Honorable, the Twelfth Judicial District Court of Louisiana, sitting in and for the Parish of Avoyelles, comes Eddie Knoll, District Attorney of the Twelfth Judicial District of Louisiana, duly elected, commissioned and qualified according to law, prosecuting in his person, for and on behalf and in the name and by authority of the State of Louisiana and with leave of said Court first had and obtained, gives the Honorable the Twelfth Judicial District Court sitting as aforesaid to know, to be informed and to understand

THAT Danny Lewis
Large St.
Mansura, La.

late of the Parish aforesaid, on or about the 2 day of October A.D., 1974 with force and arms, in the Parish, District and State aforesaid, and within the jurisdiction of the Twelfth Judicial District Court, did willfully, maliciously and feloniously, violate the provisions of La. R.S. 40:968 A, in that he did Distribute Phencyclidine, a controlled dangerous substance, as defined in the Louisiana Uniform Controlled Dangerous Substance Law, contrary to the form of the Statute of

the State of Louisiana, in such case made and provided against the peace and dignity of the same.

District Attorney
12th Judicial District La.

APPENDIX B

. . . Court; his lawyers are also present. The District Attorney and his Assistant are present, representing the State. Mr. Foreman, have y'all reached a verdict?

BY THE FOREMAN:
We have.

BY THE COURT:
All right. Madame Clerk, the Court will receive the verdict and ask you to read it to the jury and ask the jury —

BY THE CLERK:
We, the jury, find the defendant guilty as charged. Signed, Eddie P. Laborde, Foreman.

BY THE COURT:
Is that your verdict?

BY THE CLERK:
Is that your verdict?

BY THE FOREMAN:
It is.

BY THE COURT:
All right. Do you wish polling?

BY DEFENSE COUNSEL:
Yes.

BY THE COURT:
All right. Polling the jury is asking you by name if that's your verdict, each one of you, so, Madame Clerk, will read the verdict and . . .

APPENDIX C

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA,
Appellee

versus No. 56,977

DANNY LEWIS,
Appellant

Appeal from the Twelfth Judicial District Court, Parish of Avoyelles; Honorable Earl Edwards, District Judge, Presiding.

TATE, Justice.

The defendant Lewis was convicted of distribution of a controlled dangerous substance (phencyclidine), La. R.S. 40:968A, and sentenced to six years at hard

labor. Upon his appeal, he relies upon six assignments of error, which present three principal issues.

Context facts

The specific charge, as amplified and limited by a bill of particulars, is that defendant Lewis sold to Herman Rogers (a state trooper working as an undercover agent) three packets of phencyclidine (PHC) for thirty dollars. This transaction took place at a bowling alley near Mansura at about 10:00 p.m.

Preliminary to this transaction, Rogers was driving his vehicle in the company of Francisco and Keno. The latter were drug users; they did not know that Rogers was an undercover police agent. They were looking for "grass" (marijuana), when they saw Lewis parked outside a Dairy Frost with his family.

Rogers parked his car near the defendant Lewis' car. Francisco left the trooper's car, went to and conversed with Lewis, and then, per arrangements then made, both cars met a few minutes later at the bowling alley. At this time, Francisco again approached Lewis, who handed him some packets apparently containing drugs, which Francisco brought back to Rogers for examination, and then returned them to Lewis. Since the manager of the bowling alley opened his door, both cars then left.

By arrangement, both cars drove to a restaurant parking lot to complete the transaction. Once again Francisco went to Lewis' car, obtained three packets

(one of a vegetable-like substance (marijuana) in a clear plastic bag, two of a white powdered substance (PHC) wrapped in aluminum foil), obtained thirty dollars from Rogers, returned to Lewis' car and gave the money to him, then returned to Trooper Rogers' car. This first transaction occurred at about 9:35 p.m.

Then, again by pre-arrangement (to obtain more drugs), the Rogers' car returned to the bowling alley parking lot and waited for Lewis to return again. He arrived about twenty minutes later. At that time (10.00 p.m.), again, Francisco went up to the Lewis car, was handed seven packets (three of PHC in aluminum foil and four of marijuana in plastic bags) by Lewis, obtained seventy dollars from Rogers, and gave the seventy dollars to Lewis. Both cars then drove off.

In the present case Lewis is charged only with distribution of the three packets of PHC in the last (10:00 p.m.) transaction. (However, by appropriate notice before the trial, Lewis had been informed that the state intended to introduce into evidence the 9:35 p.m. marijuana-PHC transaction, as well as the sale of marijuana at 10:00 p.m. which was simultaneous with the PHC-distribution presently charged.)

In each of the incidents above-described, the Rogers' car was parked within ten feet of the Lewis car. In each instance, Rogers could see the transfer of packets and money between Lewis and Francisco, although he could not hear the conversation. In each instance, Rogers' part in the transactions was observable by the defendant Lewis. Francisco, testifying for the state (apparently under a plea bargain) described the trans-

actions with Lewis as being for the purpose of transferring the drugs from Lewis to Trooper Rogers in return for the money paid by Rogers.

From the factual evidence above described, the trial jury could infer (as it did) that Lewis was selling (distributing) the drugs to Rogers, using Francisco as the messenger between the two.

Issues of the appeal

The three principal issues raised by the defendant's appeal relate to contentions that: (1) No transaction occurred between the defendant Lewis and Trooper Rogers, as charged; (2) An inculpatory statement was improperly used against the accused; (3) Improper impeachment of a defense witness was allowed.

(1) *No transaction occurred between the defendant Lewis and Trooper Rogers*

The chief issue raised on this appeal is based upon the contention that the evidence shows that *Francisco* (not Rogers) purchased the drugs from the defendant Lewis. Based upon this contention, the defendant argues that the present bill of particulars prejudicially misinformed him that the charge was that Lewis distributed and sold the drugs to *Rogers*.

Based on this contention, the defendant argues that the only evidence admissible was of a sale from the defendant Lewis to Trooper Rogers. Thus, he contends, the evidence of the transfer to Francisco (and from Francisco to Rogers) was inadmissible under the charge, as limited by the bill of particulars to a transaction between Lewis and Rogers. (Assignment of error No. 2). He further contends that he is entitled to a mistrial (Assignment of error No. 3), and at any rate to a continuance (Assignment of error No. 4), because of the difference in the evidence presented by the state from that indicated by the bill of particulars. Finally, he contends (Assignment of error No. 5) that the other offenses (the 9:35 p.m. transaction and the 10:00 p.m. simultaneous marijuana transaction) were inconsistent with the pre-trial notice of transactions between the defendant Lewis and *Rogers* — whereas the evidence introduced was instead of transactions between Lewis and *Francisco*.

In substance, the defendant thus contends that there were two distinct distributions: (a) that between Lewis and Francisco; and (b) that between Francisco and Rogers.

However, as our summary of the evidence indicates, the delivery and distribution, La. R.S. 40:961(9), (15), was between the defendant Lewis to the agent Rogers, even though Francisco himself may have been a principal[1] in the transaction or may himself have been guilty of a distribution or a delivery.

We find no merit to this contention.

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1 La. R.S. 14:24 provides:
"All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals."

(2) *Inculpatory statement improperly used against the defendant*

By a motion for a bill of particulars, the defendant requested information as to any oral communication, either inculpatory or exculpatory, allegedly made by the defendant to any law enforcement agent. In answer, the state informed the defendant that the defendant did not make any oral admissions or statements to any member of the Avoyelles parish law enforcement agency, but that "at this time, the state is not informed as to whether any statements had been made to law enforcement officers of Rapides parish or elsewhere." (Rogers was assigned to the Rapides and Calcasieu parish state police agencies.)

Shortly after the trial commenced, the prosecutor for the first time learned that the defendant Lewis had made an inculpatory statement to the undercover agent Rogers about a week after the transaction. The statement (about a line of testimony) was to the effect that Lewis and Rogers had run into one another a week after the sale and that Lewis asked Rogers, "How was the stuff?", and Rogers informed him, "It was all right."

Before introducing the statement, the prosecutor at a hearing outside the presence of the jury established that the prosecutor had interviewed the undercover agent for the first time on the day of the trial and had for the first time learned of the statement. The prosecutor also established that the statement was not contained in the investigation report. There is no issue at all that the accurate response in the answer to the

bill of particulars was intended to mislead the defendant.

The belated discovery of the inculpatory statement did not result from any intended or bad faith desire by the prosecutor to keep the defendant in the dark as to it. As soon as the existence of the inculpatory statement was discovered, the prosecutor brought it to the attention of the defendant and the trial court outside the presence of the jury. Outside the presence of the jury, he adequately established the reasons for the state's failure to disclose the existence of the statement earlier.

Under the circumstances shown, we find no error in the trial court's permitting introducing of the inculpatory statement. Unlike State v. Boothe, 310 So.2d 826 (La. 1975), there was no patent misrepresentation, either deliberate or negligent, nor was the inculpatory statement of such a nature or importance as to constitute the injection of any issue of substantial impact upon the preparation for trial or upon trial tactics.

We therefore do not find reversible merit in this assignment.

(3) *Improper impeachment of a defense witness*

On cross-examination of a defense witness, the state, over objection, was permitted to ask the witness if his *brother* had been "busted" (i.e., arrested).[2]

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2 American Heritage Dictionary of the English Language, verbo "bust", lists "To place under arrest" as a meaning of the word. (1969).

The credibility of a witness himself may not be impeached by asking him whether or not he has been arrested; his impeachment can only be secured by questions as to his prior convictions. La. R.S. 15:495. However, the state contends that the witness can be impeached as to "bias" or "interest" by questioning him as to whether a member of his family (his brother) had been arrested, even though on an offense not related to the charge before the court.[3] (The evidence does not show on what grounds the arrest was made, although the argument of counsel in this court indicates that a drug offense was involved.)

The trial court was in error in permitting impeachment of the witness on the ground sought.

Our jurisprudence permits impeachment for any bias or interest of the witness which it might be reasonably inferred might influence his perception or color his testimony. State v. Senegal, 316 So. 2d 124 (La. 1975); State v. Elias, 229 La. 929, 87 So.2d 132 (1956) (chief prosecuting witness's bias towards members of the accused's family as based upon several incidents); Pugh, Louisiana Evidence Law 110-11 (1974); Comment, Impeachment, 21 Loyola L. Rev. 346, 360-64 (1975).

On the other hand, as these sources also indicate, questions or evidence as to general prejudices or

3 La. R.S. 15:492 provides:

"When the purpose is to show that *in the special case on trial* the witness is biased, has an interest, or has been corrupted, it is competent to question him as to any particular fact showing or tending to show such bias, interest or corruption, and unless he distinctly admit such fact, any other witness may be examined to establish the same." (Italics ours.)

special biases or interests too irrelevant to or too remote from the issues of the case at trial have been considered improper as impeachment. State v. Romano, 320 So.2d 167 (La. 1975) (syllabi 3, 4); State v. Darby, 310 So.2d 547 (La. 1975); State v. Cullens, 168 La. 976, 123 So. 645 (1929); State v. Morgan, 142 La. 755, 77 So. 588 (1917). See also La. R.S. 15:494: "It is not competent to impeach a witness as to collateral facts or irrelevant matter." In explaining this limitation, the decisions sometimes state that the witness's bias against the opposing party must be direct or personal rather than indirect or general in nature.

In the present instance, a defense witness was asked if his brother had been arrested for an offense not related to the present prosecution.[4]

Any bias that may have resulted from such a circumstance is too remote and involving too collateral an issue for it to be available as impeachment. If the credibility of the witness himself may not be impeached by questions to his own arrest on a non-related charge, La. R.S. 15:495, State v. Romano, 320 So.2d 167 (La. 1975) (syllabus 5), similar reasons of policy and fairness prevent impeachment of his credibility by questions or evidence as to any bias that might remotely result from the arrest of a member of his family on charges entirely irrelevant to the present prosecution.

As noted in State v. Cullens, 168 La. 976, 123 So. 645 (1929), similarly refusing to permit impeachment of a

4 If the arrest had been for an offense connected with the present prosecution, then a different issue may have been presented. Cf. State v. Grazianai, 168 La. 297, 121 So. 872 (1929).

witness on circumstances arising out of the arrest of his father, 123 So. 647: "The circumstance, itself, is too remote. The fact that defendant's father caused the arrest of the witness' father on a criminal charge unconnected with the offense for which defendant, himself, is being prosecuted, may be a reason for the existence of an unfriendly feeling on the part of the witness against defendant's father, but it by no means follows that it also produced in his mind a feeling of hostility towards the defendant. If testimony of this character can be introduced to discredit a witness, the question then recurs: Where is the limit to the introduction of testimony on collateral facts for that purpose?"

Therefore, in the present case, it was error to permit impeachment of the defense witness on the ground sought.

Nevertheless, reversible error did not result. The witness (Prevot) himself testified to a collateral issue: Whether, shortly before the offense charged, the defendant Lewis and Officer Rogers had quarrelled at Lewis' home (which Rogers had denied), sought to be proved as evidence of bias on Rogers' part. We are doubtful that the jury believed or disbelieved the evidence of the quarrel because of the short one-line ("Yes, m'am") admission by the witness that his brother had been "busted on two occasions"; or that, whether or not the quarrel took place, it affected the trial jury's ultimate evaluation of the credibility of the police agent as to the drug-distribution of which it found the defendant guilty.

Since the error was not a substantial violation of the constitutional or statutory right of the accused, nor was it prejudicial to the substantial rights of the accused or of a nature likely to cause a miscarriage of justice, it is not cause for reversal of the conviction. La.C.Cr.P. art. 921.

Decree

Accordingly, we affirm the conviction and sentence.

AFFIRMED.

SUPREME COURT OF LOUISIANA

No. 56977

STATE OF LOUISIANA

Versus

DANNY LEWIS

DIXON, Justice (concurring)

In my opinion there was no error in the attempt to impeach a defense witness by questioning him concerning possible bias because of a previous arrest of his brother.

APPENDIX D

Number 56,977

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

DANNY LEWIS

APPLICATION FOR REHEARING

TO THE HONORABLE, THE SUPREME COURT OF LOUISIANA:

Petitioner, DANNY LEWIS, represented by the undersigned counsel, respectfully represents:

1.

On Monday, February 23, 1976, this Court affirmed defendant's conviction of distribution of a controlled dangerous substance (Phencyclidine), La. R.S. 40:968A.

2.

It is respectfully urged that a rehearing should be granted in this case for the following reasons:

a. This Court erred in concluding that a transaction occurred between the defendant Lewis and Trooper Rogers (Assignment of Errors No. 2 through 5);

b. This Court erred in ruling that an inculpatory statement was properly admitted into evidence against the accused notwithstanding the State's pre-trial denial of its existence (Assignment of Error No. 9); and

c. This Court erred in concluding that the improper impeachment of a defense witness, although erroneous, was not prejudicial and reversible error.

3.

Petitioner shows that for the reasons stated in this application, and as amplified in his supporting brief, a rehearing should be granted.

WHEREFORE, petitioner prays that a rehearing in this case be granted, and for full, general and equitable relief.

RESPECTFULLY SUBMITTED,

GRAVEL, ROY & BURNES
711 Washington Street
Post Office Box 1792
Alexandria, Louisiana 71301

/s/ J. MICHAEL SMALL
J. MICHAEL SMALL
Attorney for Petitioner

CERTIFICATE

I certify that a copy of the Application for Rehearing has been mailed to District Attorney Eddie Knoll, Avoyelles Parish Courthouse, Marksville, Louisiana 71351, this 8th day of March, 1976.

Alexandria, Louisiana.

/s/ J. MICHAEL SMALL
OF COUNSEL

STATE OF LOUISIANA PARISH OF RAPIDES

BEFORE ME, the undersigned authority, personally came and appeared J. MICHAEL SMALL, a member of the law firm of Gravel, Roy & Burnes, who, after being sworn, stated that all allegations contained in the foregoing Application for Rehearing are true and correct.

/s/ J. MICHAEL SMALL
J. MICHAEL SMALL

SWORN TO AND SUBSCRIBED, before me, this 8th day of March, 1976.

/s/ ANN MARIE DeLOUG
NOTARY PUBLIC

APPENDIX D

SUPREME COURT OF LOUISIANA
New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 26th day of March, 1976, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS GRANTED:

56,909 Jackson, etc. v. D'Aubin
56,920 Billiot, etc. v. Bourg
56,872 State v. McNeal
56,812 State v. Glover
56,894 " "

REHEARINGS REFUSED:

56,186	State v. Newton	(On Rehearing)
56,187	State v. Leslie Newton	"
56,188	State v. Palmer	"
56,189	State v. Bonner	"
56,190	State v. Lizzie Jones	"
56,191	State v. Sentell Jones	"
56,192	State v. Flora Bell Harris	"
56,193	State v. Vera Lee Harris	"
56,194	State v. Beavers	"
56,195	State v. Sloan	"
56,196	State v. Kirts	"

TATE, DIXON and CALOGERO, J.J., are of the opinion that a rehearing should be granted.

56,673 State ex rel Guste v. Simoni, Heck
SUMMERS, J., is of the opinion that a rehearing should be granted.

56,977 State v. Lewis

56,949 Cates, etc. v. Beauregard Elec. et al
TATE and CALOGERO, J.J., are of the opinion that a rehearing should be granted.

56,994 State v. O'Neal

56,954 Barras, et al v. LPSC

57,036 State v. Boleyn
SANDERS, C.J., SUMMERS and MARCUS, J.J., are of the opinion that a rehearing should be granted.

56,996 State v. Credeur

56,623 Becker and Associates v. Lou-Ark Equip. Rentals
SUMMERS, J., is of the opinion that a rehearing should be granted.

56,784 State, Dept. of Hwys v. Ross Continental Motor Lodge
SUMMERS, TATE and CALOGERO, J.J., are of the opinion that a rehearing should be granted.

57,701 Charles Colbert v. Mike Baker Brick Company of New Iberia, Inc.
NOT CONSIDERED (Parish of Lafayette)

APPENDIX E

Criminal Docket No. 31,795

Twelfth Judicial District Court in and for the Parish of Avoyelles,

State of Louisiana

STATE OF LOUISIANA

v.

DANNY C. LEWIS

FILED: 10/6/75 /s/RHEA M. FORD, DY. CLK.

ASSIGNMENT OF ERRORS

The defendant, DANNY LEWIS, pursuant to Article 844 of the Louisiana Code of Criminal Procedure, assigns as errors the rulings of the Honorable Earl Edwards, Judge of the Twelfth Judicial District Court, in the following:

1.

In denying defendant's Motion for Change of Venue.

2.

In allowing the prosecution to introduce evidence of a transfer of a controlled dangerous substance from the defendant to someone other than the recipient listed in the State's response to the defendant's Motion for Bill

of Particulars, which particulars had sought the identity of the alleged recipient.

3.

In denying defendant's Motion for a Mistrial, based upon the prosecution witnesses reference to an offense other than that specified in the charge, and in the State's answer to the Motion for Bill of Particulars and as to which, evidence was not admissible.

4.

In denying defendant's Motion for Continuance based upon surprise and prejudice resulting from the introduction into evidence of a transfer of a controlled dangerous substance from the defendant to someone other than the recipient listed in the State's response to defendant's Motion for Bill of Particulars.

5.

In allowing, over defendant's objection, evidence of other offenses for the purpose of proving knowledge, system and intent, which offenses were not set out in the State's Notice of Intention.

6.

In allowing into evidence a brown evidence bag, containing controlled dangerous substances in the absence of a showing of adequate chain of custody.

7.

In allowing an undercover agent to testify who the "suspects" were in the drug investigation he was conducting at the time he turned over his evidence envelope to the State Police Crime Lab.

8.

In refusing to allow defense counsel to inspect an undercover agent's investigative report from which he had refreshed his memory earlier in the day.

9.

In allowing the introduction into evidence of an inculpatory statement of the defendant notwithstanding that the State denied in its response to defendant's Motion for Bill of Particulars, (and at other times) that any such statement existed.

10.

In denying defendant's Motion for a Directed Verdict at the conclusion of the State's case.

11.

In allowing the prosecutor, over defendant's objection, to ask a defense witness whether or not his brother ". . . had been busted on two occasions".

12.

In allowing the State to elicit testimony from Greg Luneau on rebuttal when said testimony did not constitute proper rebuttal evidence.

WHEREFORE, defendant, DANNY C. LEWIS, prays that these assignments of errors be duly filed and that they, along with defendant's designation of record, fully reserved for consideration on appeal the questions of law timely raised during the course of this trial.

GRAVEL, ROY & BURNES
711 Washington Street
Post Office Box 1792
Alexandria, Louisiana 71301

/s/ J. MICHAEL SMALL
J. MICHAEL SMALL
Attorney for Defendant

APPENDIX F

CRIMINAL DOCKET NO. 31,795

State of Louisiana	Twelfth Judicial District Court
vs.	Parish of Avoyelles
Danny C. Lewis	State of Louisiana
FILED: 12-9-74	By: BMC. D. Clerk

ANSWER TO MOTION FOR BILL OF PARTICULARS

NOW INTO COURT, through the undersigned Assistant District Attorney, comes the State of Louisiana, for the purpose of answering the defendant's Motion for Bill of Particulars and states as follows:

I.

An answer is not required to Article I of the Motion for Bill of Particulars.

II.

An answer is not required to Article II of the Motion for Bill of Particulars.

III.

An answer is not required to Article III to the Motion for Bill of Particulars.

IV.

In answer to Article IV of the Motion for Bill of Particulars the State shows the defendant, Danny C. Lewis, is being prosecuted for distributing phencyclidine on or about October 2, 1974, in Mansura, Avoyelles Parish, Louisiana.

V.

In answer to Article V of the Motion for Bill of Particulars the State denies said allegations contained therein.

VI.

In answer to Article VI of the Motion for Bill of Particulars the State denies the allegations contained therein.

VII.

In answer to Article VII of the Motion for Bill of Particulars the State shows that the defendant, Danny C. Lewis, is being prosecuted for violating the provisions of La. R.S. 40:968 A.

VIII.

In answer to Article VIII of the Motion for Bill of Particulars the State reiterates the same answer as cited in Article VII of the State's answer.

IX.

In answer to Article IX of the Motion for Bill of Particulars the State shows that at this time it is conducting the prosecution on the above cited criminal statute.

X.

In answer to Article X of the Motion for Bill of Particulars the State shows that the exact date of the offense was October 2, 1974 at approximately 10:00 o'clock P.M.

XI.

In answer to Article XI of the Motion for Bill of Particulars the State shows that it is not obliged to answer as this is a matter of proof to be heard at the trial of the merits.

XII.

In answer to Article XII of the Motion for Bill of Particulars the State shows that the alleged offense was committed by the defendant, Danny C. Lewis, in that he did distribute phencyclidine.

XIII.

In answer to Article XIII of the Motion for Bill of Particulars the State reiterates the same answer as contained in Article XII above.

XIV.

In answer to Article XIV of the Motion for Bill of Particulars the State shows that it is not obliged to answer as this is a matter of proof to be heard at the trial of the merits.

XV.

In answer to Article XV of the Motion for Bill of Particulars the State shows that the defendant was arrested with a warrant and if said defendant is desirous of the warrant for his arrest and the Affidavit, he may contact the Sheriff and/or Clerk of Court's office for a copy of same.

XVI.

In answer to Article XVI of the Motion for Bill of Particulars the State shows that at this time the State is not aware of the names of the law enforcement officers who arrested the person of the defendant, Danny C. Lewis.

XVII.

In answer to Article XVII of the Motion for Bill of Particulars the State shows that the arrest of Danny C. Lewis, the defendant, was made after he committed the offense of distributing phencyclidine and an investigation conducted thereafter of said offense.

XVIII.

In answer to Article XVIII of the Motion for Bill of Particulars the State shows that at this time the State is not aware of any request to communicate with an attorney, members of his family or any one else at the time of our subsequent to his arrest . . .

XIX.

In answer to Article XIX of the Motion for Bill of Particulars the State shows that the defendant was arrested on or about November 13, 1974.

XX.

In answer to Article XX of the Motion for Bill of Particulars the State shows that the defendant was arrested for two counts of distribution of marijuana and two counts of distribution of phencyclidine; at this time the State does not know the exact time that the defendant was taken into custody but was taken into custody on approximately November 13, 1974 at the Avoyelles Parish Sheriff's office.

XXI.

In answer to Article XXI of the Motion for Bill of Particulars the State shows that the defendant, Danny C. Lewis, was not interrogated but was merely brought to the Avoyelles Parish Sheriff's office to be finger printed, photographed and read his rights.

XXII.

In answer to Article XXII of the Motion for Bill of Particulars the State shows that the defendant, Danny C. Lewis, did not make any written confession, admission or statement; the balance of Article XXII the State is not obliged to answer.

XXIII.

In answer to Article XXIII of the Motion for Bill of Particulars the State of Louisiana is not obliged to answer as this is a matter of proof to be heard at the trial of the merits.

XXIV.

In answer to Article XXIV of the Motion for Bill of Particulars the State shows that the defendant, Danny C. Lewis, did not make any statements to any law enforcement officers after his arrest.

XXV.

In answer to Article XXV of the Motion for Bill of Particulars the State of Louisiana shows that the defendant, Danny C. Lewis, did not make any oral communications, oral admissions or oral statements, inculpatory or exculpatory to any members of the law enforcement agency in Avoyelles Parish, Louisiana and at this time, the State of Louisiana is not informed as to any of the above statements made to any law enforcement officers made in Alexandria, or Rapides Parish, Louisiana.

XXVI.

In answer to Article XXVI of the Motion for Bill of Particulars the State of Louisiana shows that it is not obliged to answer as this is a matter of proof to be heard at the trial.

XXVII.

In answer to Article XXVII of the Motion for Bill of Particulars the State of Louisiana shows that no evidence was taken pursuant to a search warrant.

XXVIII.

In answer to Article XXVIII of the Motion for Bill of Particulars the State of Louisiana shows that at this time the State has not obtained any exculpatory evidence or evidence favorable to the defendant, Danny C. Lewis.

XXIX.

In answer to Article XXIX of the Motion for Bill of Particulars the State of Louisiana shows that it is not obliged to answer.

XXX.

In answer to Article XXX of the Motion for Bill of Particulars the State of Louisiana shows that the physical evidence in possession of the State which will be used in the prosecution of the defendant, has been submitted for examination and test by Depart-

ment of Public Safety, Division of State Police, Crime Laboratory located in Baton Rouge, Louisiana.

XXXI.

In answer to Article XXXI of the Motion for Bill of Particulars the State of Louisiana shows:

A. The physical evidence subject to an examination and/or test were three foil packets containing a white colored substance;

B. At this time the State of Louisiana is not informed as to the type of test performed on the suspected white colored substance.

C. The examination and/or test were conducted by Mr. Paul E. Cobb, Criminalist, of the Crime Laboratory located in Baton Rouge, Louisiana.

D. The State is not informed as to any other persons conducting the said test and/or examination;

E. The test and/or examination were conducted between the dates of October 4, 1974 through October 12, 1974 in the Crime Laboratory located in Baton Rouge, Louisiana.

F. The results of the examination showed that the suspected white colored sub-

stance was determined to be phencyclidine. All technical and laboratory reports will be introduced at the trial of the merits hereof.

XXXII.

In answer to Article XXXII of the Motion for Bill of Particulars the State shows that it is not obliged to answer as this is a matter of proof to be heard at the trial of the merits.

XXXIII.

In answer to Article XXXIII of the Motion for Bill of Particulars the State shows that at this time the State does not intend to introduce similar acts by the defendant for the purpose of establishing system pattern and intent.

XXXIV.

In answer to Article XXXIV of the Motion for Bill of Particulars the state of Louisiana shows that phencyclidine which forms the basis of this prosecution:

A. The phencyclidine was contained in three foil packets in the form of white substance; the State is not informed as to the quantity in each foil packet;

B. The phencyclidine was in the form of a white substance purchased from the defendant.

C. The three foil packets of phencyclidine were purchased from the defendant in Mansura, Louisiana.

XXXV.

In answer to Article XXXV of the Motion for Bill of Particulars the State of Louisiana shows that:

A. The three foil packets of phencyclidine were sold to TFC Herman Rogers;

B. The Distribution was taken place in Mansura, Avoyelles Parish, Louisiana.

C. The price paid by the purchaser was Thirty and NO/100 ($30.00) Dollars.

XXXVI.

In answer to Article XXXVI of the Motion for Bill of Particulars the State shows that it does not have any evidence, material or information which (1) tends to negate the guilt of the defendant as to the offense charged; or (2) would tend to reduce his punishment therefor; or (3) any other evidence favorable to the accused at this time.

XXXVII.

In answer to Article XXXVII of the Motion for Bill of Particulars the State shows it does not have any exculpatory evidence at this time. The phencyclidine was distributed to a law enforcement officer namely,

TFC Herman Rogers, Louisiana State Police, Narcotics Division.

XXXVIII.

The offense occurred in Mansura, Avoyelles Parish, Louisiana at approximately 10:00 o'clock P.M.

WHEREFORE, the State of Louisiana prays that this answer be deemed good and sufficient and that it be relieved from further answering.

MS. JEANNETTE THERIOT KNOLL
ASSISTANT DISTRICT ATTORNEY

CERTIFICATE

I hereby certify that a copy of the above and foregoing Answer to Motion for Bill of Particulars has been sent to Mr. Michael Small, attorney at Law, Alexandria, Louisiana, attorney for the defendant, Danny C. Lewis, by placing same in the U.S. Mail at Marksville, Louisiana on this 9th day of December, 1974.

MS. JEANNETTE THERIOT KNOLL
ASSISTANT DISTRICT ATTORNEY